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IN THE

Supreme Court of the United States

October Term, [redacted] 1970

No. [redacted] 93

SIDNEY A. LITTMAN,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Sidney A. Littman prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit (Appendix A, *infra*), which affirmed a judgment of the United States District Court for the Southern District of New York convicting him on an indictment charging fraud and conspiracy to defraud in violation of 18 U.S.C. §§ 371, 1341, 1343 (1964) and 18 U.S.C. § 1952 (Supp. IV, 1965-68).

Opinions Below

The opinion, concurring opinion and dissenting opinion below are reprinted herein (Appendix B, *infra*).

Jurisdiction

The judgment of the Court of Appeals is dated and was entered on January 21, 1970. The Jurisdiction of the Court is invoked under and conferred by 28 U.S.C. § 1254 (1), and Rule 22 (2) of the Rules of the Supreme Court of the United States.

Questions Presented

1. Whether the powerfully incriminating extra-judicial statement of a co-defendant, who stood accused side-by-side with petitioner, and which was deliberately spread before the jury at the joint trial, abrogates petitioner's rights under the Sixth Amendment, in accordance with the rule expressed in *Bruton* v. *United States*, 391 U.S. 123 (1968)?

2. Whether petitioner was denied his Fourth Amendment rights by the admission into evidence of a tape recording without authorization in accordance with decision rendered in *Osborn* v. *United States*, 385 U.S. 323?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment (IV)

Unreasonable searches and seizures,—The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment (VI)

Rights of the accused.—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Statutes Involved

18 U.S.C. Section 2. Principals.—

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such. June 25, 1948, C. 645, Section 1, 62 Stat. 684.

18 U.S.C. Section 371. Conspiracy to commit offense or to defraud United States.—

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, Section 1, 62 Stat. 701.

18 U.S.C. Section 1341. Fraud and swindle.—

Whoever, having devised or intending to devise any scheme or artifice to defraud. or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereof, or at the place at which it is delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000. or imprisoned not more than five years, or both. June 25, 1948, c. 645, Section 1, 62 Stat. 763; May 24, 1949, c. 139, Section 34, 63 Stat. 94.

18 U.S.C. Section 1343. Fraud by wire, radio or television.—

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, transmits or causes to be transmitted by means of wire, radio or television communication in interstate or foreign commerce, any writings, signs, signals, pictures or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisonment not more than five years, or both. July 16, 1952, c. 879, Section 18 (a), 66 Stat. 722; July 11, 1956, c. 561, 70 Stat. 523.

18 U.S.C. Section 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises.—

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor or which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury. Sept. 13, 1961, P. L. 87-228, Section 1, (a), 75 Stat. 498; July 7, 1965, P. L. 89-68, 79 Stat. 212.

18 U.S.C. Section 3237. Offenses begun in one district and completed in another.—

Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in

more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, or transportation in interstate or foreign commerce is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves. June 25, 1948, c. 645, Section 1, 62 Stat. 826.

Penal Law of the State of New York.
Section 155.40—Grand larceny in the first degree.—

A person is guilty of grand larceny in the first degree when he steals property and when the property, regardless of its nature and value, is obtained by extortion committed by instilling in the victim a fear that the actor or other person will (a) cause physical injury to some person in the future, or (b) cause damage to property, or (c) use or abuse his position as a public servant by engaging in conduct within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely.

Statement of the Case

The Indictment.

Petitioner and six others were charged with mail fraud, wire fraud, the use of interstate facilities to promote the crime of extortion and conspiracy so to do in nine counts, alleging a scheme to procure gain through false pretences and fraudulent representations.

The conviction and sentence

Petitioner was convicted on all nine counts and was sentenced to six months' imprisonment on the conspiracy count and a suspended sentence and three years probation on the remaining eight counts (substantive) of the indictment.

The evidence.

The scheme to defraud began with a representation that the conspirators could obtain for the victims, lucretive Cadillac automobile agencies. To obtain the agencies, the victims were required to deposit over a million dollars with petitioner which monies were to be used immediately for the purpose of obtaining the agencies. Certain so-called "escrow agreements", which were in reality guarantees of payment, only, for return of the monies deposited, in the event the agencies were not obtained, were given by petitioner to the complainants. Thereafter, the complainants-victims were enticed into a gambling game with an "eccentric millionaire", whereby they incurred substantial gambling losses and then were threatened with bodily harm in the event they did not make their losses good. Petitioner then, in turn, was prevailed upon to release the securities he held, in the first instance in exchange for general releases from one group of complainants and then in exchange for a forged, worthless certified check in respect to the other group of victims.

The conspiracy presupposes an agreement which was not proven against petitioner. The acts attributed to petitioner could have been and were in actuality, only those of an attorney and not of a participant in the scheme to defraud.

The fact that petitioner did do things, while acting as an attorney, which parallel other actions and because this caused everything to fall into line, when viewed at a later date does not complete the proof of his having been a part of

the conspiracy. Mere acquaintance with some of the members of the conspiracy does not make petitioner a member of the conspiracy.

There was no evidence that petitioner participated in any manner in the overt acts appended to the count of conspiracy nor that he participated in the violations set forth in the other eight substantive counts.

The basis upon which the jury was swayed in reaching their verdict of conviction of this petitioner are:

When the Trial Court erred in first admitting testimony of the complainant-witness, George Desser, to which objection was made, and later on in the trial compounded this error by reversing itself and sustaining this same objection.

The statement was: "Mr. Marino said that 'Mr. Littman is the only swindler in our gang that has a law degree and I need him for the legel end of our scheme'."

and

When a tape of a telephone conversation petitioner had with one of the complainants was accepted into evidence, even though it was not played to the jury.

The opinions below.

The majority below sustained the indictment, held that the evidence was sufficient to sustain the judgment of conviction (Appendix B, pp. 2a-9a, *infra*).

The Honorable Circuit Judge Friendly, dissenting, would have reversed on the grounds that petitioner's description in the Marino telephone call was not in furtherance of the conspiracy but only gossip and hence subject to the prohibitions expressed in *Bruton* v. *United States*, 391 U.S. 123 (1968) against the receipt of inadmissible hearsay.

Reasons for Granting the Writ

Undeniably there was evidence in the case from which the jury could find a scheme to fraudulently obtain money from the complainants by the defendants. However, the important question which this case presents is whether this petitioner entered into and was a part of the fraudulent scheme. The evidence in the case linking petitioner as a knowing and conscious member of the conspiracy to defraud was meager. His activities could have been easily assigned, as only that of an attorney, without criminal intent, particularly since his only stake was the earning of a legal fee. The tipping of the scales against petitioner resulting in his conviction was accomplished by the inclusion in evidence of, primarily the hearsay telephone call, and then the taping of the other telephone call, which latter was used as "frosting on the cake".

I. The admission of certain testimony of a victim of the conspiracy requires this court to reverse under the rule announced in *Bruton* v. *United States*, 391 U.S. 123 (1968).

George Desser, one of the complainants, on direct examination, testified as follows:

That he received a telephone call from Salvatore J. Marino, one of the defendants on Saturday, May 25th about 9:30 and from the record (R. 622):

> "A. Yes, he said to my wife, 'Mr. Littman is the only swindler in our gang. . . .
>
> "Mr. Wallach: Your Honor, I am going to object to this.
>
> "The Court: Yes, it is taken subject to connection as to Mr. Littman. You have to find that there was a conspiracy, that Mr. Littman was a part of it, and that this was done in furtherance of the conspiracy during the life of the conspiracy before you may apply it to Mr. Littman.
>
> What did he say?

"The Witness: Mr. Marino said that 'Mr. Littman is the only swindler in our gang that has a law degree and I need him for the legal end of our scheme.

"Mr. Wallach: Excuse me, Your Honor, may I approach with the U. S. Attorney?

(At the side-bar)

"Mr. Wallach: Your Honor, in behalf of the defendant, Sidney Littman, I didn't want to say it in front of the jury, I hope you don't think I am out of place, but I am constrained to do it.

"A conspiracy may be terminated by an arrest or it may be terminated by the accomplishment of any illegal object. Here we have a transaction where the money is already withhold, shall we say, according to this witness, and transferred to Marino.

"Mr. Littman drew the general release up. This is all narrative. This accomplished whatever the conspiracy was in regard to the state crime.

"This is the most damaging piece of testimony yet. This is completely. . . .

"The Court: I find the objection is not valid. I find that this is in the area of after the objects of the conspiracy have been accomplished, in order to preserve the gains made during that scheme, this is in the nature of consolidating the position and keeping it in effect within the ambit of this indictment and therefore I grant you an exception and your objection is overruled."

Later in open court, jury not present (R. 635-640):

"Mr. Wallach: If it pleases Your Honor, as I recollect, before we ended yesterday the government's witness testified that Mr. Marino, after the releases were signed, about a day after, called him up and allegedly told him that Mr. Littman was a thief with

a license to practice law or words to that effect . . . a swindler with a license to practice law.

". . . some discussion about a separate conspiracy, referring to *Fiswick* v. *United States*, 329 U.S. 211 and all continuity of action ended with the last overt act.

"What Mr. Marino allegedly said to Mr. Desser was not in furtherance of any conspiracy since a conspiracy is a partnership in crime.

"It is not deemed in furtherance of an agency or partnership that an agent would say something that would incriminate his partner, in other words, not incriminate himself and thereby his partner, but accuse his partner of being a thief or a swindler.

"The Court: . . . Motion for mistrial denied with exception to defendant. I will, however, give further consideration to what I now take to be a request to strike certain testimony, and that I will reserve decision on, namely, that he was a swindler, and so forth."

Later, in open court, jury not present (R. 850-851):

"The Court: . . . By the way, I have been thinking about that application you made, which I in effect reserved decision on when you moved for the mistrial. I am inclined to agree with you at this point, as I see it, it is only allowable as against Marino and it is not allowable as against your client.

"I will do it in either one of two ways as you indicate to me you and your client want. I will either make that announcement to the jury now, during the course of the trial, or I will do it when I charge the jury and indicate clearly that at that time that statement was only applicable to Marino in the nature of an admission.

"Mr. Wallach: Thank you.

"The Court: It is not applicable as against him."

Then, the Court asked Mr. Wallach to tell him whether to announce it during trial or in the charges. It is clear, at this point, however, that the damage to petitioner was already done, was irreparable, and that nothing now could be done to ameliorate the devastating effect of this admittedly prejudicial ruling.

Then, at the conclusion of the trial in the Court's charges (R. 1378) in addressing the jury:

> "If you say to a boy, 'Go in that corner and don't you think of a white elephant, the first thing he thinks of as soon as he gets in the corner is a white elephant, and that is what he shouldn't do and that is what you shouldn't do."

Then the damaging statement is repeated (R. 1379, 1380), in addressing the jury:

> "The Court: When Desser was being examined he made the following answer: 'A. Mr. Marino said that Mr. Littman is the only swindler in our gang that has a law degree, and I need him for the legal end of our scheme'."
>
> "Now, I have stricken that from the record. That is not evidence in the case. The only one that that statement is binding on is Mr. Marino himself. It does not bind Mr. Littman. . . ."

Again the wound is opened (R. 1397, 1398), in addressing the jury:

> "The Court: However, a statement of any conspirator which is not made in furtherance of the conspiracy or which is made before its inception or after its termination may be considered as evidence only against the person making it.
>
> "I call your attention again to the statement that I struck from the evidence about Marino. That may only be referrable to Marino and no one else."

This last statement of the Court to the jury was highly prejudicial since it presupposes the existence of a conspiracy and that petitioner is one of the conspirators.

The leading case on this subject is *Bruton* v. *United States*, decided by the Supreme Court of the United States in the October Term of 1967, No. 705, and was argued March 11, 1968 and decided May 20, 1968. The citation is *George William Bruton*, Petitioner v. *United States*, 391 U.S. 123, 20 L. Ed 2d 476, 88 S. Ct. 1620.

In this case, the judgment of conviction was reversed because certain confession evidence was admitted whereby the Petitioner's accomplice incriminated him. It was held by the Court that since the accomplice did not testify, the introduction of his confession added substantial weight to the government's case in a form not subject to cross-examination, thereby violating Petitioner's Sixth Amendment right of cross-examination, and that this encroachment on Petitioner's constitutional right could not be avoided by a jury instruction to disregard the confession as to Petitioner—per Brennan, J.

The effect of such a confession cannot be wiped from the brains of the jurors—per Black, J.

A basic premise of the Confrontation Clause, it seems to me, is that certain kinds of hearsay (see e.g. *Pointer* v. *Texas*, 380 U.S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065); *Douglas* v. *Alabama*, 380 U.S. 415, 13 L. Ed. 2d 934, 85 S. Ct. 1074) are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, whatever instructions the trial judge might give. . . . An accusation is even more prejudicial.—per Stewart, J.

In *Roberts* v. *Russell*, 392 U.S. 293, 88 S. Ct. 1921, 20 L. Ed. 2d 1110, it was stated that the "Bruton rule" was

retroactive. Defendant's right of cross-examination may be violated by the introduction into evidence, in a joint trial, of a co-defendant's incriminating extra-judicial statement. In the circumstances of this case, the Supreme Court held that cautionary instructions by the judge to the jury could not eliminate the substantial prejudice to the petitioner.

The decision that the "Bruton rule" was retroactive was followed in:

Wheat v. *Washington,* 292 U.S. 652, which was remanded to Supreme Court of Washington for reconsideration in the light of *Bruton* v. *United States* and *Witherspoon* v. *Illinois,* and in

Wade v. *Yeager, Warden,* 392 U.S. 661, which remanded to United States Court of Appeals for Third Circuit and judgment vacated.

See also:

Roberts v. *Russell, infra,* and

Grosso v. *United States,* (1968), 390 U.S. 62, 88 S. Ct., 709, 19 L. Ed. 2d 906.

In *United States* v. *Jones,* defendant was convicted of perjury on verdict in U.S.D.C., S.D. of N.Y. before William B. Herlands, J. The judgment was affirmed on appeal, 374 F.2d 414. The United States Supreme Court vacated the judgment of the Court of Appeals and remanded for further consideration, 392 U.S. 299, 88 S. Ct. 2050, 20 L. Ed 2d 1104. Upon remand reported in 402 F.2d 851 (1968) CA—2nd Circuit, before Moore, Friendly and Smith, Circuit Judges, it was decided that the crucial testimony of the co-defendant before the grand jury was not subject to cross-examination and that it was more than a fair likelihood, that the jury was unable to perform the feat en-

joined on it by the court's instructions to disregard the testimony.

In *United States ex rel. Joseph* v. *La Vallee,* 290 F. Supp. 90 (1968) U. S. Dist. Ct., N. D., New York, James T. Foley (Chief Judge), it was held that federal habeas corpus would be granted where inadmissible hearsay evidence of co-defendant, which inculpated petitioner, was received in evidence under circumstances where effective redaction was impossible.

In *John Grafton Gray,* Appellant v. *United States of America,* Appellee, 407 F.2d 830, U. S. Ct. of Appeals, 5th Cir., 3/6/69, a motion to vacate judgment under 28 U.S.C.A. Section 2255 was made relying on U.S.C.A. Const. Amend. 6. Reversed and new trial granted:

> "On that approach, the receipt of this out-of-court evidence over timely objection orbits to a constitutional apogee within the thrust of Section 2255."

In *United States* v. *Lyon,* 397 F.2d 505 (1968), U. S. Ct. of Appeals, 7th Cir., it was held that a co-defendant's extra-judicial admissions which implicated a defendant as a partner in a prostitution enterprise, as post-conspiracy declarations were inadmissible against defendant, and introduction of such admissions at a joint trial violated defendant's right of confrontation, and such violation could not be directed by instruction. Reversed.

In *United States* v. *Kelly,* 399 F.2d 692 (1968) 3rd Cir.—Reversed—Inculpatory statements of co-defendants may not be admitted in evidence during a joint trial—inadmissible.

In *Calloway* v. *United States,* 399 F.2d 1006, C.A.D.C. (1968) defendant is denied Sixth Amendment right to confront witnesses against him if confessions of non-testifying co-defendant which inculpates him is introduced at joint

trial despite cautionary instructions by judge that confession should be considered as evidence only against confessor.

To same effect:

Townsend v. *Henderson*, 405 F.2d 324 (1968) 6th Cir.

Serio v. *United States*, 401 F.2d 989 (1968) CA—Dist. of Col.

Atwell v. *United States*, 398 F.2d 507 (1968) CA 5th Cir.

Under traditional rules of evidence, hearsay statements inculpating petitioner are clearly inadmissible against him, see *Krulewitch* v. *United States*, 336 U.S. 440, 93 L. Ed. 790, 69 S. Ct. 716, and *Fiswick* v. *United States*, 329 U.S. 211, 91 L. Ed. 196, 67 S. Ct. 224.

It has been suggested that the limiting instruction actually compounds the jury's difficulty in disregarding the inadmissible hearsay. See Broeder, The University of Chicago Jury Project, 38 Neb. L. Rev. 744, 753-755 (1959).

In *Delli Paoli* v. *United States*, 229 F.2d 319, 321, which rule was subsequently changed by *Bruton* v. *United States;* it was said by Judge Learned Hand:

> "The limiting instruction, is a 'recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else'. *Nash* v. *United States*, 54 F.2d 1006, 1007; Nobody can indeed fail to doubt whether the caution is effective, or whether usually the practical result is not to let in hearsay.' *United States* v. *Gottfried*, 165 F.2d 360, 367; . . . it is indeed very hard to believe that a jury will, or for that matter can, in practice observe the admonition. . . ."

Judge Hand referred to the instruction as a "placebo", medically defined as a "medicinal lie". Judge Jerome Frank suggested that its legal equivalent "is a kind of judicial lie". It undermines a moral relationship between the courts, the jurors and the public; like any other judicial deception, it damages the decent judicial administration of justice". *United States* v. *Grunewald*, 233 F.2d 556, 574. See also 8 Wigmore, n. 3, Section 2272 at P. 416.

The use of limiting instructions fosters an inconsistent attitude toward juries by "treating them at times as a group of low-grade morons and at other times as men endowed with a superhuman ability to control their emotions and intellects". E. Morgan, Some Problems of Proof under the Anglo-American System of Litigation 105 (1956).

See also *Shepard* v. *United States*, 290 U.S. 96, 104, 78 L. Ed. 196, 201, 54 S. Ct. 22, Meltzer, Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury, 21 U. Chi. L. Rev. 317, 326 (1954).

An important element of a fair trial is that a Jury consider only relevant and competent evidence bearing on the issue of guilt or innocence. See *E. G. Blumenthal* v. *United States*, 332 U.S. 539, 559, 560, 92 L. Ed. 154, 169, 68 S. Ct. 248. From: *Daley* v. *United States*, 231 F.2d 123, 125.

Rules 8 (b) and 10 of the Federal Rules of Criminal Procedure, which deal with joinder of defendants, were designed to promote economy and efficiency and to avoid a multiplicity of trials where these objectives can be achieved without substantial prejudice to the right of the defendants to a fair trial. However, each defendant is entitled to have his case determined from his own acts and statements and the other evidence in the case which may be applicable to him. Under the traditional rules of evidence, a co-defendant's statement inculpating the accused is inadmissible against the accused as hearsay. An accused's right of cross-

examination secured by the Sixth Amendment is violated at his joint trial with a co-defendant who does not testify by the admission of the co-defendant's statement inculpating the accused, notwithstanding jury instructions that the co-defendant's statements must be disregarded in determining the accused's guilt or innocence.

The decision below squarely conflicts with *Bruton* v. *United States, supra.* Certiorari should therefore be granted to resolve the conflict and to decide whether the decision below sustaining the conviction does not violate the Bruton rule which has been followed in all recent decisions.

II. The admission of a tape recording made by one of the victims of a conversation he had with petitioner, and the subsequent failure to play this tape to the jury constitute reversible error (Government's Exhibit 15A; R. 179-181).

The use of the wire-tap recording of a telephone conversation between petitioner and Philip Shapiro, one of the complainants, as evidence, was unconstitutional, in violation of the Fourth Amendment of the Constitution of the United States.

A ruse was used by the agents of the Federal Bureau of Investigation to circumvent the unconstitutional wire-tapped secured evidence when it was submitted that Shapiro, of his own volition and with his own instrument secured the recording. It is noted that such wire-tap offered into evidence was actually made when the F.B.I. agents were on the Shapiro premises, and under their direction.

Section 605 was enacted as part of the Federal Communication Act of 1934, 48 Stat. 1103, six years after the Court had said in *Olmstead* v. *United States*, 277 U.S. 438, 465, that "Congress may of course (legislate to) protect the secrecy of telephone messages by making them, when

intercepted, inadmissible in evidence . . .". In *Nardone* v. *United States*, 302 U.S. 379, the Court was first called upon to decide whether Sec. 605 had indeed served to render evidence of intercepted communications inadmissible in a federal trial. In that case, the Government urged that "a construction be given the section, which would exclude federal agents since it is improbable Congress intended to hamper and impede the activities of the government in the detection and punishment of crime", 302 U.S. at 383. In reversing the judgment of conviction, the Court's answer to that argument was unequivocal:

> "(T)he plain words of Sec. 605 forbid anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear language that 'no person' shall divulge or publish the message or its substance to 'any person'. To recite the contents of the message in testimony before a court is to divulge the message. The conclusion that the act forbids such testimony seems to us unshaken by the government's arguments." (From Lee v. United States, at p. 378).

This rule applied to state officers in:

Benanti v. *United States*, 355 U.S. 96;

Mapp v. *Ohio*, 367 U.S. 643.

The federal law itself explicitly protects intercepted communications from divulgence in a court or any other place.

The F.B.I. agents were present and listening in on the telephone conversation when made, and directed Shapiro's wire-tap and recording of it.

In the leading case of *Katz* v. *United States*, 1967, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 576, it was held that a listening device attached by government agents outside a phone booth was illegal search and seizure prohibited by

the Fourth Amendment of the Constitution of the United States without a warrant therefor and thus reversible error.

The interception of telephone conversations reasonably intended to be private could constitute a "search and seizure", and that the examination or taking of physical property was not required.

View of 4th Amend.—

Wong Sun v. *United States,* 371 U.S. 471 at 485, 83 S. Ct. 407 at 416, 9 L. Ed. 2d 441,

and

Berger v. *State of New York,* 388 U.S. 41 at 51, 87 S. Ct. 1873 at 1879, 18 L. Ed. 2d 1040.

See:

Silverman v. *United States,* 365 U.S. 505, 81 S. Ct. 679, 5 L. Ed. 2d 734.

Appellant "sought to exclude . . . the uninvited ear", and spoke under circumstances in which a reasonable person would assume that uninvited ears were not listening.

> ". . . and of course, the very nature of electronic surveillance precludes its use pursuant to the suspect's consent." (Adapted from Katz v. United States, infra).

In absence of search warrant or court authorization, federal agent's electronically eavesdropping on conversation between informer, on whom transmitter had been placed, and defendant, who did not know of eavesdropping, violated defendant's Fourth Amendment rights, even though informer with whom defendant conversed had consented to the eavesdropping. (Decision by Swygert, Cir. J.).

United States v. *White,* 405 F.2d 838, 1969, 7th Cir.

In *Osborn* v. *United States,* 385 U.S. 323, 87 S. Ct. 429, 17 L. Ed. 2d, 394 (1966), in a 6-3 decision, the Court emphasized the essentiality of prior authorization. There a paid informer recorded conversations between himself and defendant in order to corroborate his sworn statement. However, there, a warrant was obtained.

Here a reversal is required since appellant did not consent to the eavesdropping and no antecedent justification was sought or obtained.

The wire-tap was introduced into evidence over objection.

The fact that it was not played to the jury may very well have given the jury reason to infer that it would be indictable and highly prejudicial to petitioner. Actually, petitioner's taped telephone conversation was exculpatory. The jury could not have known this but could, instead, reason that it was inculpatory. If petitioner was tried separately, he would not have objected to the jury hearing the tape of his telephone conversation, once it was admitted into evidence, but this does not detract from the prejudice generated in this trial by the wire-tap.

The petitioner respectfully urges this Court to consider the question of wire-tap evidence and its disclosure, in order to preserve the integrity of the fact-finding process in the federal system.

The petitioner has challenged many other rulings of the district court each of which would be ground for reversal. Many of these errors are serious and important. Inasmuch, however, as the two major constitutional questions already treated are sufficient to dispose of the case, and are clearly substantial it does not seem necessary to discuss these additional points in this statement.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

ALFRED D. LERNER,
Attorney for Petitioner.

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APPENDIX A

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 205—September Term, 1969.

(Argued October 16, 1969 Decided January 21, 1970.)

Docket No. 33682

UNITED STATES OF AMERICA,

Appellee,

—v.—

SIDNEY A. LITTMAN,

Appellant.

Before:

FRIENDLY, HAYS and ANDERSON,

Circuit Judges.

Appeal from a conviction for fraud and conspiracy to defraud in violation of 18 U.S.C. §§ 371, 1341, 1343 (1964) and 18 U.S.C. § 1952 (Supp. IV 1965-68) after a jury trial in the United States District Court for the Southern District of New York, John M. Cannella, *Judge.*

Affirmed.

ALFRED D. LERNER, New York, New York, *for Appellant.*

JAMES D. ZIRIN, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, James Schreiber, Assistant United States Attorney, on the brief), *for Appellee.*

APPENDIX B

Opinions of Court of Appeals

HAYS, *Circuit Judge*:

Sidney A. Littman appeals from a judgment of conviction entered after a jury trial in the United States District Court for the Southern District of New York. Littman was convicted, along with five co-defendants, of nine counts including wire fraud, 18 U.S.C. § 1343 (1964), mail fraud, 18 U.S.C. § 1341 (1964), use of interstate facilities to promote an unlawful activity, 18 U.S.C. § 1952 (Supp. IV 1965-68), and conspiracy, 18 U.S.C. § 371 (1964).

Littman claims *inter alia* that the evidence introduced against him was insufficient to support his conviction; that the admission of certain testimony of a victim of the conspiracy requires this court to reverse under the rule announced in *Bruton* v. *United States*, 391 U.S. 123 (1968); and that the admission of a tape recording made by one of the victims of a conversation he had with appellant, and the subsequent failure to play this tape to the jury, constitute reversible error.

We find no merit in these or appellant's additional claims of error and therefore affirm the judgment of conviction.

I.

The trial testimony proved the existence of an astonishing scheme involving Littman, who was a lawyer, and six others which eventually defrauded two groups of businessmen out of approximately 1.3 million dollars.

The scheme began with the false claim that the conspirators could obtain Cadillac agencies for the victims. To this end they were persuaded to deposit large amounts of money in escrow with Littman. It was represented that this money was to be used to bribe officials in the Cadillac organization. Later the victims were encouraged to participate in a gambling game with an entirely ficti-

tious "eccentric millionaire." Finally the victims were told that they had suffered huge gambling losses, and threatened with bodily injury unless they paid these debts. The first group of victims paid by signing releases, prepared by appellant for the funds he supposedly held in escrow.[1] The second group of victims was not so easily frightened and when pressed to pay, reported the swindle to the F.B.I.

Taking the evidence, as we must, in the light most favorable to the government, see e.g., *United States* v. *Dardi*, 330 F.2d 316, 325 (2d Cir.), cert. denied, 379 U.S. 845 (1964), we find that the jury had sufficient grounds upon which to reach its conclusion as to appellant's guilt.

That evidence can properly be viewed as establishing that Littman was present at meetings of the conspirators at the home of one Salvatore Marino when details of the fraudulent scheme were being planned, that he disbursed the proceeds of the fraud to Marino and Marino's creditors, that he went with Marino to the race track where Marino bet what the jury could have concluded was a part of the funds supposedly held by Littman in escrow, that he prepared and accepted delivery of releases from two of the victims when it was fair to assume he knew that they were acting under threat of physical injury, and that he accepted further payments from some of the victims when it was fair to assume he knew of the threats to others.[2]

---

[1] The testimony shows, and Littman concedes, that he never respected his escrow obligations.

[2] Appellant's contention that there was no proof adduced to show that he knew interstate facilities were to be used is without merit. The jury was certainly entitled to find on the basis of the part he played in the scheme, that Littman was aware that these facilities would be used.

II.

At the trial, George Desser, one of the victims of the fraud, related the contents of a telephone conversation between his wife and Salvatore Marino, one of the co-conspirators, which Desser overheard. The relevant portion of Desser's testimony is as follows:

> Q. And on Saturday, May 25 about 9:30 in the evening, did there come a time when you received a call from Mr. Marino? A. Yes, I did and, as I say, I can't recall every one of these calls. I believe he said "You had some nerve talking that way. Blacky meant every word that he said that Saturday night and these union boys"—excuse me, just a minute, I am trying to see if I can remember.
>
> "He meant every word that he said that Saturday night and your husband is in terrible danger and in terrible trouble and these union boys are real tough."
>
> Q. Do you recall anything else that was said? A. Yes, he said, "We'll be over to get you and we'll put you through a torture the likes of which you have never seen."
>
> Q. Do you remember anything else that was said? A. *Yes, he said to my wife, "Mr. Littman is the only swindler in our gang"*—
>
> Mr. Wallach: Your Honor, I am going to object to this.
>
> The Court: Yes, it is taken subject to connection as to Mr. Littman. You have to find that there was a conspiracy, that Mr. Littman was a part of it and that this was done in furtherance of the conspiracy during the life of the conspiracy before you may apply it to Mr. Littman.
>
> What did he say?

> The Witness: *Mr. Marino said that "Mr. Littman is the only swindler in our gang that has a law degree and I need him for the legal end of our scheme."* (Emphasis added.)

Littman contends that the admission of the italicized comments require this court to reverse under *Bruton* v. *United States, supra,* despite the fact that the trial judge subsequently ruled that the statement admissible only against Marino.

Bruton is inapposite. There the challenged statement was a co-defendant's confession made to a government agent after the confessing defendant's arrest. *Bruton* held that a trial judge's instruction to confine the effect of such evidence to the author of the confession was insufficient to protect a co-defendant from prejudicial effect.

The instant case presents quite a different question. Here, since there was substantial independent evidence of Littman's participation in the conspiracy, testimony as to statements by a co-conspirator in the course of the conspiracy was properly admitted as a declaration made in furtherance of the conspiracy. *United States* v. *Pugliese,* 153 F.2d 497, 500 (2d Cir. 1945); *Van Riper* v. *United States,* 13 F.2d 961, 967 (2d Cir. 1926).

III.

It is argued that the admission of a tape recording made by one of the victims of the conspiracy of a telephone conversation he had with Littman constitutes reversible error. Reliance is placed primarily on *Katz* v. *United States,* 389 U.S. 347 (1967). *Katz* held that evidence acquired by bugging of a telephone booth without a warrant was inadmissible when the evidence consisted of a conversation between two persons who were both unaware of the bugging. This court has held where one party to the conversation con-

sents to its being monitored, *Katz* does not apply. *United States* v. *Polansky*, —— F.2d —— (2d Cir. Oct. 27, 1969); *United States* v. *Kaufer*, 406 F.2d 550 (2d Cir.), affirmed, 394 U.S. 458 (1969), on the basis of *Desist* v. *United States*, 394 U.S. 244 (1969). Appellant's contention that 47 U.S.C. § 605 (Supp. IV 1965-68) was violated by the recording and that his conviction must therefore be reversed is equally unpersuasive. *Rathbun* v. *United States*, 355 U.S. 107 (1957); see *Lee* v. *Florida*, 392 U.S. 378, 381 (1968).

Having argued at the trial that the tape was inadmissible, appellant now contends that the tape was exculpatory and the failure of the trial court to have it played to the jury constitutes reversible error. If the tape was truly exculpatory appellant could have used it on cross-examination but chose not to do so. We have examined a transcript of the tape in question and conclude that the failure to have it played to the jury in no way prejudiced appellant.[3]

Affirmed.

---

[3] In *United States* v. *Marino*, decided January 14, 1970, the conviction of Littman's co-conspirators on counts 5 and 6 was vacated on grounds not raised on Littman's appeal. The court in *Marino* found that the vacating of the conviction on counts 5 and 6 did not require remand for resentencing because of the concurrent sentence doctrine. See *United States ex rel. Weems* v. *Follette*, 414 F.2d 417 (2d Cir. 1969).

Appendix B—Opinions of Court of Appeals

ANDERSON, *Circuit Judge* (concurring):

In view of my brother Friendly's dissent, I will comment briefly on the nature of the connection between the conspiracy and the quoted testimony, which persuades me that the Marino-Desser telephone conversations were in furtherance of the conspiracy and that *Bruton* v. *United States*, 391 U.S. 123 (1968) is not applicable.

The victims of the fraudulent scheme were business men who fell into roughly two groups: Desser and Bernstein were identified with one, and the Shapiros with the other. There was, however, but one conspiracy and one set of co-conspirators who mulct all those whom they could ensnare.

The time came when the conspirators became convinced that they had squeezed the last sou out of Desser, but his money had been deposited in escrow with Littman and, he had signed and delivered releases, drafted by Littman and running to Littman and Marino, stating that he, Desser, no longer had any claim to the funds. To discourage Desser from entertaining the idea that he might take some legal action to void the releases and recover his money, it was important to the conspiracy to convince Desser that Littman was acting as lawyer for the conspirators, that he had seen to it that they were in a legally sound position, and that it would be hopeless and futile to attempt any such thing. In addition to this, the threats of torture and other reprisals were designed to keep Desser *in terrorem* and fully convinced that any attempt at recovery would be not only useless but dangerous.

There is another reason why it was essential to the furtherance and successful completion of the conspiracy that Desser be kept in a condition of helplessness and abject fear, and that is, that the Shapiros had only paid over a

part of what the conspirators expected to extract from them. If Desser told them of the fraudulent nature of the scheme, the Shapiros would refuse to make any further payments. This was a problem built into the nature of the conspiracy where the plan was to extort money out of several persons nearly contemporaneously. Once a victim had been cleaned out and realized that he had been defrauded, he was likely to reveal what had happened, and the conspiracy would be disrupted before it was carried to its full fruition. It was, therefore, a part of the plan to make the earlier victims so terrified that they would be afraid to speak.

This is distinguished from *Krulewitch* v. *United States,* 336 U.S. 440 (1949); *Lutwak* v. *United States,* 344 U.S. 604 (1953); and *Grunewald* v. *United States,* 353 U.S. 391 (1957), which held that a subsidiary conspiracy to conceal the crime and avoid detection and punishment will not be implied as a part of the original conspiracy, the criminal purposes of which have been achieved. Rather, the present case comes within the exclusion from that rule, which the Court stated as follows:

> "By no means does this mean that acts of concealment can never have significance in furthering a criminal conspiracy. But a vital distinction must be made between acts of concealment done in furtherance of the *main* criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime." *Grunewald* v. *United States, supra* at 405.

The trial judge's original ruling was correct and when he reversed himself and instructed the jury to disregard the testimony in question, he gave Littman an advantage to which he was not entitled. The statements were admissible as made in furtherance of the conspiracy and are not barred by the rule in the *Bruton* case.

FRIENDLY, *Circuit Judge* (dissenting):

If the trial judge had ruled that the description of Littman alleged to have been incorporated in Marino's telephone call was in furtherance of the conspiracy, I would have accepted the ruling on the grounds elaborated in Judge Anderson's concurring opinion. Indeed I might well have so ruled had I been presiding at the trial. But the judge found otherwise, and there was warrant for his considering the statement to have been simply a piece of gossip. We should give the same respect to such a negative determination on a preliminary question of fact relating to admissibility as when the determination goes the other way. See *United States* v. *Lopez*, —— F.2d ——, ——, slip opinions 639, 643 (2 Cir. 1969).

Once that position is accepted, *Bruton* v. *United States*, 391 U.S. 123 (1968), calls for reversal. While that case involved a confession by a coconspirator and this does not, *Bruton* was not limited to the precise facts there presented. The decision extended to other instances of the receipt of inadmissible hearsay where "the risk that the jury will not, or cannot follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored" 391 U.S. at 135. The Court's further statement, "Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial," 391 U.S. at 135-36, fits this case exceedingly well.

I would reverse for a new trial.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1208

SIDNEY A. LITTMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1970. The petition for a writ of certiorari was filed on February 19, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the admission in evidence of a statement of a co-conspirator referring to petitioner, which the trial judge thereafter instructed the jury

not to consider against petitioner, requires reversal under *Bruton* v. *United States,* 391 U.S. 123.

2. Whether a taped recording of a telephone conversation between petitioner and a witness, made by the witness without government authorization or suggestion, and not played to the jury, was properly admitted in evidence.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner and five others were convicted of traveling in interstate commerce to carry out an extortion scheme (one count), wire fraud (five counts), mail fraud (two counts), and conspiracy to commit these substantive offenses, in violation of 18 U.S.C. 371, 1341, 1343, and 1952.[1] On June 9, 1969, he was sentenced to imprisonment for six months on the conspiracy count and to three years' probation on the remaining counts. The court of appeals affirmed, one judge dissenting (Pet. App. A).

In December 1967, co-defendant Marino told one George Desser that he had contacts within the Cadillac Car Division of General Motors, and was thereby able to secure Cadillac franchises in the New York City and nearby New Jersey areas. Marino identified his insiders as "Hank," who lived in Detroit and was in charge of all Cadillac agencies on the east coast, and "Arthur," who served the east coast distribution center in Teaneck, New Jersey (Tr. 485,

[1] A sixth co-defendant, James Reynolds, entered pleas of guilty to conspiracy and two of the substantive counts, and was severed. He testified for the government at petitioner's trial.

491–492).[2] Marino convinced Desser to furnish capital, initially for the purchase of individual automobiles at discount prices for resale at a profit, and later for the acquisition of a Cadillac agency in Monmouth County, New Jersey (Tr. 484, 491, 496). Marino showed Desser a letter on Cadillac stationery indicating that an agency was forthcoming (Tr. 492–493, G. Ex. 19). During December, Desser and an associate (Irving Bernstein) gave Marino $23,000 for car purchases, and $100,000 for the agency.

Marino introduced petitioner as the attorney who would handle the legal work. In petitioner's presence, Marino said that petitioner knew "Hank" and "Arthur", and had previously performed work for them (Tr. 500–501, 506–507). In mid-January 1968, Desser and Bernstein each invested another $50,000 with Marino for a second Cadillac agency, in Plainview, Long Island (Tr. 508–512). In fact, neither "Hank," "Arthur," the Monmouth County nor the Plainview agency ever existed (Tr. 881–882, 925), and the letter purporting to have come from Cadillac was false (Tr. 885–886).

Within the next month, investments in two more agencies were discussed. Desser and Bernstein were introduced to co-defendants James Reynolds and Marie McGinley, whom Marino identified as "Hank's" public relations man and his girl friend (Tr. 513, 533). In fact, Reynolds had never been connected with Cadillac, and Miss McGinley was Marino's girl

[2] "Tr." refers to the eight-volume transcript of trial, filed with the Clerk of this Court.

friend. Both had been schooled in their roles by Marino (Tr. 921–923).

By this time Desser and Bernstein had invested a total of $400,000 (Tr. 521–522). At a meeting in petitioner's law office in February 1968, they expressed a desire that sufficient security be deposited for their investment. Petitioner agreed to hold $400,000 in General Motors stock, which he was to "receive" from "Hank" and "Arthur" (Tr. 519). Later that month, petitioner notified Desser that the stock had been deposited with him (Tr. 568).

That same month, Marino told Desser and Bernstein that he could obtain an agency at 59th Street and 5th Avenue in New York City. Another partner in that venture was to be one Hy Kauf, and ultimately, his three nephews, Philip, Sidney, and Jerry Shapiro (Tr. 538–539).

On February 21, 1968, petitioner and the Shapiros entered into a formal agreement whereby they would turn over $250,000 to be held in escrow by petitioner until the Cadillac agency was awarded or until July 1, 1968. If the partnership was not selected for the franchise, petitioner was to return their money (Tr. 59–61). Philip Shapiro gave petitioner a check for $100,000 and thereafter a check for $150,000. Petitioner stated that he wanted to cash the checks and place the money in his safety deposit box (Tr. 299, see Tr. 63–65).

In March, April, and May, the Shapiros became involved in the same type of car deals as Desser and Bernstein, both for individual cars and for fictitious agencies (Tr. 71–74, 82–84). Large sums of money

and receipts for car purchases were deposited with petitioner in escrow for these ventures (Tr. 79–80, 93). The receipts were false (Tr. 94, 891). Petitioner commingled the escrowed moneys with his personal bank accounts, from which he disbursed large amounts to Marino or his creditors as well as to himself (Tr. 870–875, 938).

Thereafter, Marino, who had obtained $1,300,000 from Desser, Bernstein and the Shapiros, told his victims a fictitious story about an "eccentric millionaire" who enjoyed wagering on horses, but invariably lost (Tr. 104–107, 540–545). He stated that co-defendant Borgese, his driver, had made a great deal of money booking these bets, and that Reynolds, "Hank," "Arthur," and himself were backers of Borgese (Tr. 103, 546–547). In March 1968, after some urging by Marino, Desser and Bernstein agreed to involve themselves as backers. The Shapiro brothers reluctantly consented in May (Tr. 108, 548). Thereafter, Marino and Borgese announced the amount of "wins" or "losses" weekly.

The victims were ahead of the game until the week designated by Marino for the "hit." For Desser and Bernstein the "hit" would come in the week of May 13; for the Shapiros, two weeks later (Tr. 110, 559). The "hit" involved a bet of "last for last," that is, the horse with the heaviest odds was wagered to come in last in every race. Such a wager inevitably would cause the backers to suffer staggering losses.

A few days before the scheme was to be executed against Desser and Bernstein, Marino met with petitioner and co-defendant Reynolds. Petitioner asked,

"When are you going to make it last for last?" (Tr. 950). When told that it was about to be done, petitioner asked, "Well, who is going to take the beating this time?" (Tr. 948). He was told who the victims would be, and was directed to be available the following Sunday, May 19, to prepare releases of the escrow agreements (Tr. 948–949).

On Thursday, May 16, a meeting was held at which final arrangements were made for the "hit." Borgese was instructed to inform Desser and Bernstein that the bet for that week had been "last for last." Once the amount of losses was computed, co-defendants Alfano (Marino's neighbor) and Petrozelli (Alfano's relative) were to pretend to be strong-arm agents of the "millionaire," who would threaten Desser and Bernstein with death if they refused to pay their share. A feigned beating of Marino was arranged to show the victims that the thugs intended to carry out their threats (Tr. 950–951). All of these plans were carried out with the desired effect (Tr. 583–589).

Early Sunday morning, May 19, Desser called petitioner and told him that he was in fear of his life because he had been threatened with a gun the prior evening and he had seen Marino after he had been "beaten" by four men. Desser asked petitioner to call "Arthur." An hour or so later petitioner called Desser and reported that he could not reach Arthur (Tr. 587–589).

That evening, Desser, Bernstein, Marino and Reynolds met. After some discussion concerning what had occurred, Marino suggested, as a settlement of the debt owed by Desser and Bernstein, that they release their

escrow money and pay $50,000 each (Tr. 590–598). Marino then called petitioner, who thereafter arrived carrying release forms and a portable typewriter (Tr. 598, 955–956). Out of the hearing of Desser and Bernstein, petitioner said to Marino, "So they agreed to give up the releases." Marino responded by smiling (Tr. 957–958). Petitioner then prepared the releases, which Desser and Bernstein signed (Tr. 602–604).

The next day Desser removed all of his savings—about $38,000—which he delivered to Marino. Bernstein turned over $50,000 (Tr. 604–607). Marino told Desser that he and Bernstein would be relieved of any further debt, but that Desser was not to talk to the Shapiro brothers about it (Tr. 611–613). For the next few days Desser and his wife received threatening telephone calls from Marino and Petrozelli to assure their silence (Tr. 618, 622).

Two days after he prepared the Desser-Bernstein releases, petitioner accepted from the Shapiros two checks totalling $250,000, representing the balance of their investment in a fictitious Cadillac agency (Tr. 94). The Shapiros learned of the "last-for-last" bet from Reynolds by telephone on Monday, May 27. They tried to withdraw from the scheme but were told by Borgese that they had to remain with the betting for the remainder of the week (Tr. 111–112). Petrozelli then commenced to apply various scare tactics either by telephone or in person. Each time he warned the Shapiro brothers that they would be expected to pay their share of the losses the following Friday. On May 27, Petrozelli and Alfano visited the Shapiros' place of business and threatened that they and their

families would be killed and their apartments destroyed if they sought to avoid payment (Tr. 117, 125, see also Tr. 142–143).

On June 3, Philip Shapiro reported the incidents to the FBI. Bergese was arrested on June 4 when he came to the Shapiros' offices to collect (Tr. 144, 156). The next day Marino arranged for petitioner to be given a forged certified check—which petitioner would pretend not to recognize as being fraudulent—covering the amount of the Shapiros' investment held in escrow, $750,000. Marino then dictated a letter to the Shapiros, signed by Reynolds, that "unknown to Sidney Littman" he (Reynolds) and Petroselli had removed the escrow moneys in exchange for a worthless certified check, and that there was nothing to gain by further cooperation with the police (Tr. 171–175, 989–990). After he received the letter, Philip Shapiro received a call from petitioner informing him that he had been given a false certified check in exchange for the escrow funds. When asked why he had taken the bad check, petitioner stated that he had been pressured to do so (Tr. 180).

ARGUMENT

1. After testifying to his involvement in the Cadillac agency and betting transactions outlined above, Dezner stated that he and his wife began to receive threatening telephone calls from Petroselli and Marino. During one of these conversations, on May 25, while the Shapiros were trying to withdraw from the betting swindle, Dezner listened in on an extension line to a conversation between Marino and Mrs.

Deaser in which Marino said, "Mr. Littman is the only swindler in our gang—" (Tr. 622). At this point defense counsel objected and the court instructed the jury that the comment would be taken subject to connection, and could only be considered against petitioner if the jury first found that there was a conspiracy, that petitioner was a part thereof, and that the statement was made during the life of and in furtherance of the conspiracy. The court then allowed the witness to complete the sentence. Deaser then testified that Marino said, "Mr. Littman is the only swindler in our gang that has a law degree and I need him for the legal end of our scheme" (Tr. 622). Thereafter, the court stated that he agreed with petitioner's counsel that the comment should be admissible only against Marino and instructed the jury:

> Now I have stricken that from the record. That is not evidence in the case. The only one that that statement is binding is Mr. Marino. It does not bind Mr. Littman. * * * The only one you may consider against at all is Marino, and that is all.

Petitioner contends that the admission of this remark, even with the insulating instruction, violated the rule of *Bruton* v. *United States*, 391 U.S. 123. As the court below held, however, the distinctions between this case and *Bruton* are readily apparent. This case does not involve a post-arrest confession of a co-defendant, with its likely impact upon the jurors, but rather a reference by a witness to the remarks of a co-conspirator, in furtherance and during the course of a conspiracy. See Judge Anderson's con-

curring opinion in the court below, Pet. App. 7a–8a. As such, it was admissible against petitioner. See *Parness* v. *United States*, 415 F. 2d 346 (C.A. 3); *Campbell* v. *United States*, 415 F. 2d 356 (C.A. 6); cf. *Bruton*, *supra*, 391 U.S. at 128 n. 3. The district judge accorded petitioner an undeserved benefit when he ordered the jury not to consider the statement in deliberating upon petitioner's guilt. The explanation and cautionary instructions of the court were precise and simple and could not have been misunderstood. See *United States* v. *Corallo*, 413 F. 2d 1306 (C.A. 2), certiorari denied, 396 U.S. 958.[1]

In addition, the evidence of petitioner's guilt as set forth above was overwhelming, wholly apart from any effect which the challenged comment might have had. The record is abundant with competent evidence that petitioner was an active participant in the conspiracy. In this context, error, if any, in the trial court's treatment of this issue was harmless beyond a reasonable doubt. *Harrington* v. *California*, 395 U.S. 250; see *James* v. *United States*, 416 F. 2d 467, 475 (C.A. 5), certiorari denied, February 24, 1970 (No. 746, this Term); *Slawek* v. *United States*, 413 F. 2d 957 (C.A. 8); *Clark* v. *United States*, 412 F. 2d 491 (C.A. 9), certiorari denied, 396 U.S. 919; *United States* v. *Levinson*, 405 F. 2d 971 (C.A. 6), certiorari denied, 395 U.S. 958; *United States* v. *Lipowitz*, 401 F. 2d 591 (C.A. 3), certiorari denied *sub nom. Muller* v. *United States*, 395 U.S. 924.

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[1] "It is not unreasonable to conclude that in many * * * cases the jury can and will follow the trial judge's instructions to disregard [hearsay] information." *Bruton*, *supra*, 391 U.S. at 135.

2. Philip Shapiro testified that for at least eight months prior to June 1968, he had owned a device capable of recording telephone conversations; that after he reported the fraud to the FBI he began to record all telephone conversations with certain of the defendants; and that the FBI neither knew nor suggested that he make these recordings (Tr. 198–225). The tape recordings were admitted in evidence over objection of defense counsel (Tr. 225–231). After hearing the tapes outside the jury's presence, petitioner's counsel stated that the tapes should not be played because, as to petitioner, their prejudicial impact would outweight their admissibility (Tr. 239). The court ruled that the tapes were cumulative and would not be played, but that if a dispute arose regarding the substance of the conversations, he would let the jury hear the tapes (Tr. 1002–1003). The tapes were never played to the jury. Petitioner's allegations (Pet. 18, 21) that the recordings were made at the instigation of the government and that they were exculpatory thus find no support in the record.

At all events, the admission in evidence of the one tape recording of a conversation with petitioner did not violate any of petitioner's rights. When talking to Shapiro on the telephone, petitioner assumed the risk that the latter might record their conversation. There was no interference with any justifiable expectation of privacy on petitioner's part, and hence no constitutional or statutory violation. The decision in *Katz* v. *United States*, 389 U.S. 347, did not overrule the Court's decision in *Rathbun* v. *United States*, 355 U.S. 107. There is thus no reason to delay dis-

position of the instant case pending decision in *United States* v. *White*, No. 46, this Term, set down for reargument on January 19, 1970, involving the consensual carrying of a radio transmitter. See the government's brief in opposition in *Fukumoto* v. *United States*, No. 1359 Misc., this Term.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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